APPENDIX B

JUDGMENT

Cases Nos. 7140 to 7143 inc.—the New Mexico cases
Nos. 7181 to 7188 inc.—the Colorado cases
Nos. 7211 and 7212—the Utah cases

Thirteenth Day, February Term, Friday, March 15th, 1963.

Before Honorable JEAN S. BREITENSTEIN, Honorable DELMAS C. HILL and Honorable OLIVER SETH, Circuit Judges.

These causes came on to be heard on the transcripts of the records from the United States District Court for the District of New Mexico, the United States District Court for the District of Colorado, and the United States District Court for the District of Utah, and were argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that cases Nos. 7140 to 7142 (the New Mexico cases) and cases Nos. 7211 and 7212 (the Utah cases) are reversed and remanded for further proceedings, and that cases Nos. 7181 to 7188 (the Colorado cases) be and the same are hereby affirmed.

APPENDIX C

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No.

FEDERAL PACIFIC ELECTRIC COMPANY AND GENERAL ELECTRIC COMPANY,

Petitioners,

v.

CITY OF KANSAS CITY, MISSOURI,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

Petitioners pray that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Eighth Circuit entered in the above-entitled actions on November 6, 1962, severally reversing judgments of the United States District Court for the Western District of Missouri and remanding the cases to that court for further proceedings.

Opinions Below

The opinion of the United States Court of Appeals for the Eighth Circuit is reported in 310 F.2d 271. It is attached as Appendix A to this petition.

The opinion of the United States District Court for the

Western District of Missouri is reported at 210 F. Supp. 545, and is set out at R 32, and again at R 88.[1]

Jurisdiction

The judgments of the Court of Appeals for the Eighth Circuit (Appendices B and C) were entered November 6, 1962. A timely petition for rehearing was filed and was denied on November 30, 1962. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

Question Presented

Whether there exists in the federal law some doctrine of "fraudulent concealment" which Congress impliedly intended to toll the four-year limitation period set forth in Section 4B of the Clayton Act (15 U.S.C., § 15b). The District Court answered the question "No", and the Court of Appeals, reversing and remanding, answered the question "Yes".

Statutes Involved

Clayton Act, Section 4 (38 Stat. 731, 15 U.S.C. § 15).

Suits by persons injured; amount of recovery.

> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

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[1] References preceded by "R" are to the Record as printed for use of the Court below, ten copies of which have been filed here.

Clayton Act, Section 4B (69 Stat. 283, 15 U.S.C. § 15b).

Limitation of actions.

"Any action to enforce any cause of action under section 15 or 15a of this title shall be forever barred unless commenced within four years after the cause of action accrued. No cause of action barred under existing law on the effective date of this section and sections 15a and 16 of this title shall be revived by said sections."

Clayton Act, Section 5(b) (69 Stat. 283, 15 U.S.C. § 16 (b)).

Judgment in favor of Government as evidence; suspension of limitations.

"(b) Whenever any civil or criminal proceeding is instituted by the United States to prevent, restrain or punish violations of any of the antitrust laws, but not including an action under section 15a of this title, the running of the statute of limitations in respect of every private right of action arising under said laws and based in whole or in part on any matter complained of in said proceeding shall be suspended during the pendency thereof and for one year thereafter: Provided however, That whenever the running of the statute of limitations in respect of a cause of action arising under section 15 of this title is suspended hereunder, any action to enforce such cause of action shall be forever barred unless commenced either within the period of suspension or within four years after the cause of action accrued."

Statement of the Case

The two actions which are the subject of this petition were commenced in the United States District Court for the Western District of Missouri to assert a claim for treble damages as authorized by Section 4 of the Clayton Act (15 U.S.C. § 15) allegedly resulting from a conspiracy to fix prices on specified types of electrical equipment in violation of Section 1 of the Sherman Act (15 U.S.C. § 1). The amended complaint against Federal Pacific Electric Company (No. 13709-1 in the District Court, No. 17117 in the Court of Appeals) seeks unspecified damages claimed to have resulted from the excessive price plaintiff allegedly paid for circuit breakers in 1954. (R 25)

The amended complaint against General Electric Company (No. 13710-2 in the District Court, No. 17118 in the Court of Appeals) involves power switching equipment and seeks unspecified damages claimed to have resulted from the excessive price plaintiff allegedly paid for that product in 1954. (R 79 and 80)

The complaints were filed on February 1, 1962, and alleged that government proceedings relating to the products which are the subject of the suit were commenced on February 16, 1960 as to circuit breakers (R 22) and on May 19, 1960 (R 77) as to power switching equipment. It is apparent, therefore, that at least five years elapsed between the time the claims are alleged to have accrued, and the time of commencement of government proceedings.

Both defendants filed motions to dismiss or for summary judgment, contending that the suits were barred by the four-year statute of limitations contained in Section 4B of the Clayton Act (15 U.S.C. § 15b). Plaintiff sought to avoid the express limitation contained in Section 4B by

claiming that the statute was tolled by the "fraudulent concealment" alleged in the amended complaints. Plaintiff thus argued that the statute did not begin to run until it discovered the existence of its alleged causes of action by reason of the commencement of government litigation in 1960. Plaintiff stated in open court that it was satisfied with the complaints and did not desire to amend. (R 29, 30)

The District Court sustained defendants' motions and entered judgments dismissing the complaints. The Court of Appeals reversed these judgments and remanded the cases for trial on the basis that a so-called doctrine of "fraudulent concealment" should be read into Section 4B. The Court said that under proper circumstances the limitation period would be tolled until the plaintiff, in the exercise of reasonable diligence, discovers, or should have discovered, the cause of action.

Prior to final judgment in the Court of Appeals the plaintiff had filed a petition for certiorari in this Court. A single petition was filed covering both cases. This petition was not ruled upon until after the opinion of the Court of Appeals had been rendered, which of course made the petitioning plaintiff the successful party. The present petitioners (joined by *amici curiae*, defendants in other electrical antitrust cases around the United States) opposed that petition as being premature. The petition was denied by order of this Court dated November 19, 1962. 371 U.S. 912.

REASONS FOR GRANTING THE WRIT

1. The Petition Presents An Important Question Of Federal Law Which Has Not Been, But Should Be, Settled By This Court.

These cases involve an important and far-reaching question of federal law concerning the proper construction and application of Section 4B of the Clayton Act.[2] Since its enactment in 1955, that statute of limitations has not been construed by this Court. Prior to 1955 no federal statute of limitations governed antitrust damage litigation, and the courts therefore borrowed state limitation statutes. Section 4B, which establishes a fixed four-year statute of limitations for civil damage actions, applies to all private treble damage actions and to government single damage actions for violations of the antitrust laws. Because of this broad scope, construction and application of this statute will have an obvious impact on antitrust litigation affecting all areas of the business community.

The instant cases are two of the more than 1800 civil suits seeking treble damages against the electrical equipment manufacturing industry as a result of criminal indictments returned in the United States District Court for the Eastern District of Pennsylvania in 1960. Almost all of those 1800 cases assert, in part, claims which would be barred (along with other claims which would not be barred) by the four-year limitation period set out in Section 4B if that statute cannot be tolled. In practical terms, the question raised in all of the more than 1800 cases is whether

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[2] On February 7, 1963, in San Antonio, Texas, Judge Robson, on behalf of the special committee of judges formed at the recommendation of the Chief Justice of the United States, indicated that the question here presented is of such importance that the prevailing parties in courts below should join in seeking review by the Supreme Court.

treble damages can be claimed not only for four years but for periods of time extending back indefinitely. A number of the cases pending in District Courts other than for the Western District of Missouri claim damages extending back as far as thirty years.

This Court is aware of the magnitude of the problems raised in pretrial discovery in the litigation of these more than 1800 electrical equipment cases. The Chief Justice of the United States recommended that a special committee of judges consider the handling of these cases,[3] and they have initiated a national discovery program to ease the burden upon the federal judiciary. A proper disposition of discovery problems by the lower courts would be facilitated if this Court ruled definitively as to whether recovery is limited to the period prescribed by the statute. Should this Court decide that tolling is not available, the scope of many cases will be substantially reduced, thereby greatly easing the unprecedented pressure upon the federal courts.

Should the decision of the Court below stand, its holding that a federal doctrine of "fraudulent concealment" tolls Section 4B will open the floodgates for concealment allegations in every antitrust suit hereafter brought. This fact is not mere conjecture, as the present 1800 electrical equipment cases conclusively demonstrate. The staggering burden placed upon the federal judicial system if the decision below is to stand would not end, but rather would only begin, with this litigation. Hereafter trial courts would be required not only to conduct pretrial discovery as far back as a plaintiff chose to allege "fraudulent concealment", but in each instance try the matter of "concealment" and "discovery" to determine the period of recovery.

The pending 1800 electrical cases are merely a current

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[3] See New York Times, February 7, 1962, p. 1, col. 7.

illustration of the impact of the problem created by the decision below. In view of the more than 200 private antitrust actions commenced each year in the federal courts,[4] the importance for the administration of the federal judiciary of the decision to toll the statute is manifest. There is thus a paramount public interest in having this issue finally resolved.

This petition, on all counts, presents one of the most important and substantial questions to arise in recent years with respect to federal civil litigation.

2. There is A Substantial Diversity of Judicial Views on the Question Presented.

The opinion below is in conflict with an opinion of the United States District Court for the District of Utah, *Brigham City Corp.* v. *General Electric Company*, 210 F. Supp. 574 (D. Utah 1962), and with an opinion of the United States District Court for the District of New Mexico, *Public Service Company of New Mexico* v. *A. B. Chance Company, et al.*, July 31, 1962, 1962 CCH Trade Cases, ¶ 70,551. Both of these cases held that Section 4B cannot be tolled by reason of a claim of fraudulent concealment. Interlocutory appeals from the Utah and New Mexico judgments, as well as an appeal from a decision of the United States District Court for the District of Colorado allowing tolling, were granted under 28 U.S.C. Section 1292(b) by the Court of Appeals for the Tenth Circuit and were heard together on January 11, 1963. No opinion has yet been handed down in these cases.

The opinion below also in is direct conflict with an opin-

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[4] Annual figures for the years 1957-1961 are given in *Annual Report of the Director of the Administrative Office of the United States Courts* 163 (1961). The figure for 1961 was 378.

ion of the United States District Court for the Northern District of Georgia. *Rinzler* v. *Westinghouse Electric Corp.*, Case No. 7427, October 30, 1962, not yet reported. The Georgia case was an action predicated upon alleged violations of the Robinson-Patman Act, and it was dismissed by the court on a finding that Section 4B could not be tolled. An appeal from the Georgia case has been taken to the United States Court of Appeals for the Fifth Circuit. In addition, that Court has permitted an interlocutory appeal from a decision of the United States District Court for the Western District of Texas, sustaining tolling of the statute of limitations. Both of these appeals are pending and no date has as yet been set for oral argument.

The United States Court of Appeals for the Second Circuit has handed down an opinion permitting tolling, *Atlantic City Electric Company* v. *General Electric Company*, December 31, 1962, 1963 CCH Trade Cases ¶ 70,604. Judge Moore filed a strong dissent. We are advised that a petition for writ of certiorari will be filed promptly in this case.

An interlocutory appeal has been allowed from a judgment of the United States District Court for the Northern District of Illinois permitting tolling (*Commonwealth Edison Co.* v. *Allis-Chalmers Manufacturing Co.*, 210 F. Supp. 557 (N.D. Ill. 1962)) and was argued in the Court of Appeals for the Seventh Circuit on February 11, 1963.

Interlocutory appeal has also recently been granted by the Court of Appeals for the Ninth Circuit with respect to a decision permitting tolling in the Southern District of California. *City of Los Angeles* v. *Allis-Chalmers Manufacturing Company, et al.*, January 8, 1963, 1963 CCH Trade Cases, ¶ 70,651.

All district courts which have passed on the question

have found that there are "substantial grounds for difference of opinion" on the question presented, so as to permit interlocutory appeal. Moreover, this diversity of opinion and the varying stages of decision in many of the circuits demonstrate the necessity for a definitive, nationwide decision by this Court of the question presented.

3. This Important Federal Question Was Not Correctly Decided By The Court Below And Its Decision Conflicts With Principles Established By This Court.

Congress has unquestioned power to enact statutes of limitation which are absolute and not subject to tolling for any reason. *Midstate Horticultural Co.* v. *Pennsylvania R. Co.*, 320 U.S. 356 (1943). The intent of Congress is and must be controlling.

In Sections 4B and 5(b) of the Clayton Act, Congress has used the clearest and most emphatic language possible to express its intent absolutely to bar recovery of all causes of action either four years after they have accrued or after the period of suspension (incident to pending government proceedings) specifically provided. Section 4B states:

> "Any action to enforce *any* cause of action . . . shall be *forever barred* unless commenced within four years after the cause of action accrued."[5]

Plain language in a statute of limitations leaves nothing for construction. *Uncxcelled Chemical Corp.* v. *United States*, 345 U.S. 59, 64 (1953). This is especially true in the case of statutes which are penal in character and therefore must be strictly construed. *Huntington* v. *Attrill*, 146 U.S. 657 (1892). Section 4 of the Clayton Act

[5] In all quoted passages, emphasis is supplied unless otherwise noted.

has been so characterized. *Commissioner* v. *Glenshaw Glass Company*, 348 U. S. 426 (1955). Moreover, the 1955 amendments to the Clayton Act are not silent on the subject of tolling, but rather permit tolling in one, and only one, specific situation. Thus, Section 5(b) provides that if enforcement proceedings are commenced by the United States within the four-year period established by Section 4B, the time bar shall be suspended during the pendency of such enforcement proceedings and for one year thereafter:

> ". . . whenever the running of the statute of limitations . . . is suspended hereunder [by reason of government enforcement proceedings], any action shall be forever barred unless commenced either within the period of suspension or within four years after the cause of action accrued."

This express exception is inconsistent with a finding of implied exceptions and shows that Congress intended tolling only in that specified circumstance. *Soriano* v. *United States*, 352 U.S. 270 (1957).

The Court of Appeals held, however, that Section 4B can be tolled pursuant to a supposed federal judicial tolling doctrine if a defendant "fraudulently conceals" the antitrust violation which is the basis of the claim.

While the clear language of Sections 4B and 5(b) alone seems sufficient to establish that Congress manifested its intent not to have any judicial tolling doctrine read into the statute, petitioners have not and do not rest on that manifestation of Congressional intent alone. The fact is that, on its way to the adoption of the 1955 statute of limitations, Congress gave prolonged consideration to the problem of the potential treble damage plaintiff from whom a cause of action has been concealed. Congress, nonethe-

less, repeatedly rejected bills providing for the tolling of the period of limitation until discovery in the exercise of due diligence of the cause of action in conspiracy cases. In attempting to cope with that legislative history, the Court below fell into three significant errors, with the result that it reached a decision wholly at odds with the Congressional intent. First, the Court misapprehended the state of the decisional law during the period of the Congressional deliberations. Second, the Court misunderstood the nature and purpose of the tolling provisions which Congress considered and rejected. Third, the Court permitted the last minute statements of two Congressmen (Representatives Patman and Celler) to outweigh the obvious meaning of six years of legislative history in both Houses, including the committee reports.

As to decisional law, the Court erroneously assumed the existence of a federal doctrine of "fraudulent concealment." It viewed the supposed doctrine as dating back to *Bailey* v. *Glover*, 88 U.S. (21 Wall.) 342 (1875), and thereafter as read into every federal statute of limitations by the decision of this Court in *Holmberg* v. *Armbrecht*, 327 U.S. 392 (1946). From this erroneous assumption, the Court below mistakenly concluded that "Congress was presumptively aware of the [supposed 'fraudulent concealment'] doctrine" and must have intended it to govern the new antitrust limitation. This misconception wholly distorted the Court's approach to the legislative history of Section 4B and erroneously placed upon the defendants the burden of establishing an express Congressional disclaimer—in just so many words—of an actually non-existent federal doctrine.

Contrary to the interpretation by the Court below, the *Bailey* line of cases enunciates an equitable tolling doctrine of "discovery" applicable only to fraud cases; that

is, cases where the gravamen of the cause of action is fraud. Both the *Bailey* and *Holmberg* cases and a long line of Supreme Court decisions applying the *Bailey* fraud doctrine were suits to redress injuries caused by fraud.[6] These cases specifically state that when "fraud . . . is the foundation of the suit" (88 U.S. at 349) and a plaintiff remains in ignorance of the fraud, without any fault or want of diligence or care on his part, then

> ". . . the bar of the statute does not begin to run until the *fraud is discovered*, though there be no special circumstances or efforts on the part of the party committing *the fraud to conceal it from the knowledge of the other party*." 327 U.S. at 397

Examination of the very judicial authority upon which the Court below relied establishes that no such tolling rule as the supposed doctrine of "fraudulent concealment" had been applied as a matter of federal law to an antitrust action through 1955, when Congress enacted Section 4B, and therefore Congress could not have intended the doctrine to apply by implication. To the contrary, in *Moviecolor Ltd.* v. *Eastman Kodak Co.*, 288 F. 2d 80, 84 (2d Cir. 1961), one of the cases principally relied upon by the Court below, another Court of Appeals stated that neither its research nor that of the parties revealed a case decided by this Court or any Court of Appeals which had theretofore, prior to 1961, held the *Bailey* line of cases applicable to a federal cause of action "at law", antitrust or otherwise.[7]

In fact, in two instances prior to consideration by Con-

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[6] *E.g., Exploration Co.* v. *United States*, 247 U.S. 435 (1918); *Rosenthal* v. *Walker*, 111 U.S. 185 (1884); *Tracy* v. *Clews*, 115 U.S. 528 (1885); and *United States* v. *Diamond Coal & Coke Co.*, 255 U.S. 323 (1921).

[7] The Court in *Moviecolor*, however, did read *Bailey* as establishing a tolling doctrine labeled "concealment of the wrong." 288 F.2d at 82, 83.

gress of a federal statute of limitations in the antitrust field, when plaintiffs attempted to extend the *Bailey* fraud doctrine to an antitrust treble damage action, such extension was rejected. *State of Oklahoma ex rel. Phillips* v. *American Book Co.*, 144 F. 2d 585 (10th Cir. 1944), and *Burnham Chemical Co.* v. *Borax Consolidated Ltd.*, 170 F.2d 569 (9th Cir. 1948), *cert. denied*, 336 U.S. 924, *rehearing denied*, 336 U.S. 955 (1949). In the latter case, the plaintiff in his petition to this Court for a writ of certiorari specifically urged that the *Bailey* fraud doctrine should be extended to antitrust actions. After certiorari was denied in the *Burnham* case, proponents of such a tolling provision turned to Congress in 1949, and thereafter, to write into the proposed federal statute of limitations a discovery proviso patterned identically after the long-standing fraud doctrine, but to apply solely to conspiracy cases.

In 1949, bills were introduced in the House and Senate establishing an antitrust statute of limitations (H.R. 4985; S. 1910). Each bill contained a provision that in causes of action based upon conspiracy, the statute would not begin to run until the plaintiff discovered, or by the exercise of reasonable diligence should have discovered, the facts relied upon for proof of the conspiracy. Bills with similar provisos were also introduced in 1950 (H.R. 7905) and in 1951 (H.R. 1986). These were the so-called "discovery provisions" which the Court below recognized were rejected by Congress after lengthy hearings.[8]

[8] Hearings on S. 1910 Before a Subcommittee of the Committee on the Judiciary, United States Senate, 81st Cong., 1st Sess. (1949) (hereinafter called Senate 1949 Hearings); Hearings Before the Subcommittee on Study of Monopoly Power of the Committee on the Judiciary, House of Representatives, 81st Cong., 2d Sess., Ser. 14, Pt. 5, 1950 (hereinafter called House 1950 Hearings); Hearings Before the Subcommittee on the Study of Monopoly Power of the Committee on the Judiciary, House of Rep., 82nd Cong., 1st Sess., Ser. 1, Pt. 3, 1951 (hereinafter called House 1951 Hearings).

The Court below, however, misconceived the significance of the rejection of these discovery provisos, viewing them as different in substance from the "fraudulent concealment" doctrine said to be established by *Bailey*. This analysis is defective in two major respects. First, as demonstrated above, the doctrine of *Bailey* is a fraud-discovery doctrine and it is quite obvious that the proponents of the discovery provisos were attempting, by legislation, to extend this fraud-discovery rule into the non-fraud field of antitrust damage actions. For example, Thurman Arnold, former chief of the Antitrust Division of the Department of Justice, testified that the purpose of the bills was to invoke "the ordinary rule of equity that the statute should not run on fraud until the discovery [of the cause of action]." Senate 1949 Hearings at 6-7. Joseph W. Burns, an opponent of the provisos and later legal counsel to the Senate Judiciary Committee when Section 4B was passed in 1955, stated: "What Mr. Arnold is trying to do is to have this type of action [antitrust conspiracy] called a fraud action so that all rules with respect to fraud actions which have been built up over hundreds of years to meet a particular situation would be applied to this type of action for which they were never intended." Senate 1949 Hearings at 56.

The provisions were unequivocally rejected by both the Senate and House as unworkable and contrary to the purpose of enacting a uniform statute of repose in the antitrust laws. Opponents convinced Congress that "In the fraud field experience has indicated that the discovery provision does not operate smoothly or happily. It injects this element of uncertainty when the fraud has been discovered."[9] The entire legislative history demonstrates, *inter alia*, that Congress, in rejecting the discovery provisos, was specifically rejecting an extension of the *Bailey*

[9] Professor Milton Handler, House 1950 Hearings at 21.

fraud-discovery doctrine into the non-fraud field of anti-trust conspiracy.

Secondly, the opinion below is utterly unjustified in the assertion that Congress, in rejecting the conspiracy discovery provisos of the cited bills, nevertheless intended to maintain and preserve a purported, but actually non-existent, judicial tolling exception labeled "fraudulent concealment". In the first place, there is no support in the cases for any such federal tolling doctrine.[10] That this was the understanding of Congress is evidenced by the fact that, even after this Court's decision in *Holmberg*, when Congress has sought to toll a statute of limitations in actions which by their very nature are shrouded in secrecy or can under normal circumstances be expected to be concealed, it has expressly so provided.[11]

The legislative history shows, moreover, that Congress, in considering and rejecting the arguments of the proponents of the discovery provisos, did not intend to make any exception to its rejection of the tolling-until-discovery concept. Witnesses and Congressmen repeatedly pointed out the difficulty of discovering concealed conspiracies and the need for legislative enactment of the rejected discovery provisions so that "a plaintiff may [not] lose his day in court because the defendants have succeeded in conceal-

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[10] As previously noted, at least until 1961, more than five years after the enactment of Section 4B, no appellate court had even suggested that the federal doctrine of *Bailey* was a fraudulent "concealment" rule applicable to a non-fraud cause of action. Such a suggestion was first asserted, and then only by way of *dictum*, in *Moviecolor Ltd.* v. *Eastman Kodak Co.*, 288 F.2d 80 (2d Cir. 1961), *cert. denied*, 368 U.S. 821 (1961).

[11] For example, with reference to forged or altered checks, Congress has provided that, "If any endorser . . . shall fraudulently conceal the cause of action from the knowledge of the United States . . ., the action may be commenced at any time within two years after the United States . . . shall discover . . . such a cause of action although such action would be otherwise barred by the provisions of sections 129-131 of this title." 31 U.S.C. § 131.

ing their conspiracy from outsiders."[12] As this Court observed in *Grunewald v. United States*, 353 U.S. 391, 402 (1957), conspiracies are necessarily secret and accompanied by efforts to cover the conspirators' traces.

The Court below apparently held that the legislative history is not convincing because the rejection was of a concept which the Court deemed to be entirely different from "fraudulent concealment": "... Congress itself recognized the difference between failing to discover and fraudulent concealment." This notion is plainly wrong; its only support is drawn from the label "discovery", inartfully adopted by the proponents of the conspiracy tolling provisions. It is perfectly clear that Congress was *not* dealing with simple discovery, *i.e.*, with cases in which there is no conspiracy or other concealment on the part of the defendants causing non-discovery but nevertheless the injured party is unaware of the violation. Had Congress directed its attention to such simple discovery, the limitation of the provisos to conspiracy, their requirement of due diligence, and all the discussions during the hearings regarding concealment of causes of action would have been meaningless and irrational.

Alternatively, it is possible that the Court below in disregarding the rejection by Congress of the conspiracy discovery provisos, was drawing a distinction between "active" concealment (called "fraudulent concealment") and self-concealment.[13] Pursuant to such a rationale, the Court's decision would permit tolling where defendants actively conceal from a plaintiff his cause of action but not

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[12] Senate 1949 Hearings, 6-7, 19; House 1950 Hearings 25, 45, 59-60, 65; House 1951 Hearings, 100; 96 Cong. Rec. 10442 (1950).

[13] The opinion below states, "... we are satisfied that there is a marked difference in tolling the statute of limitations because of the failure to discover, and tolling the limitation period because the parties who engaged in unlawful conduct (conspiracy or combination) are successful through *affirmative action, in concealing* the cause of action itself."

where the plaintiff's failure to discover is the result of the inherently self-concealing character of the cause of action. But any such alternative ground of decision is equally fallacious. It was the entire concept of concealment—applied in cases of both actively concealed conspiracies as well as inherently secret conspiracies—which Congress rejected. Any such distinction between "active concealment" and "self-concealment" would charge Congress with the absurdity of intending to permit tolling only in the event of an actively concealed conspiracy, while rejecting tolling provisions for a conspiracy which is inherently secret and so well set up that no particular steps are needed to cover the conspirators' traces.[14] Such a distinction is without support in judicial precedent or in the legislative history.

The only other aspect of the legislative history referred to by the Court below is a colloquy between Representatives Patman and Celler, which took place on a day when there was no roll call and when the only recorded vote in the House showed forty-six members to be present.[15] Mr. Celler stated that in conspiracy cases "the statute of limitations only runs from the time of discovery."[15] Mr. Celler thus said in effect that the very discovery provisos for conspiracy cases, which had been rejected by Congress, were nevertheless to be read into the statute. He spoke only of discovery of conspiracy, without any mention of concealment. In no way did Mr. Celler allude to the requirement of "fraudulent" con-

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[14] Judge Christensen stated in *Brigham City Corp. v. General Electric Co.*, 210 F. Supp. 574, 577 (D. Utah 1962): ". . . these [self-secreting conspiracies] may be the ones in practice that prove the most effective, predatory, far reaching and damaging." Quite obviously, an inherently secret conspiracy which is so well set up that no steps need be taken to cover up the conspirators' traces would probably be equally as hard to discover as would be a conspiracy with traces which must be hidden by further acts of the wrongdoers.

[15] 101 Cong. Rec. 5128, 5133 (1955).

cealment found by the Court below. In relying upon this colloquy, the Court below ignored the teachings of this Court that such statements by individual Congressmen, particularly those who seek to revive rejected legislation, are not indicative of the intent of Congress. *Pennsylvania R. Co.* v. *International Coal Mining Co.*, 230 U.S. 184 (1913); *Federal Trade Commission* v. *Anheuser-Busch, Inc.*, 363 U.S. 536, 553 (1960).

Furthermore, the Court below failed to consider the committee reports relating to H.R. 4954. It was the bill containing the 1955 amendments to the antitrust laws and was enacted without amendment even though Representative Patman persisted, after his colloquy with Representative Celler, in urging an amendment applicable to all antitrust causes of action so that "the period of limitations shall not commence to run until at least covert wrongs have been discovered."[16] Both the House and Senate committee reports contain extensive discussions of tolling and neither suggests that any tolling situation is to be recognized other than the one specifically set out in the statute. *Cf. Soriano* v. *United States*, 352 U.S. 270 (1957). Both reports make it emphatically clear that an absolute time bar which commences at the time the cause of action accrues or within one year after the government case is concluded would best serve the policy underlying the enforcement of the antitrust laws:

> "While the committee believes it important to safeguard the rights of plaintiffs by tolling the statute during the pendency of Government antitrust actions, it recognizes that in many instances the long duration of such proceedings taken in conjunction with a lengthy statute of limitations may tend to prolong stale claims,

[16] 101 Cong. Rec. 5132-5133 (1955).

unduly impair efficient business operations, and overburden the calendars of courts. It believes the provisions of this bill will *tend to shorten* the period over which private triple damage cases will extend by *requiring* that the plaintiff bring his suit *within 4 years* after it *accrued* or within 1 year after the Government's case has been concluded.

. . . . . .

"... [The Committee] does not believe that the undue prolongation of proceedings of this type is conducive to effective and efficient enforcement of the antitrust laws." H.R. Rep. No. 422, 84th Cong., 1st Sess. (1955) at 8-9.[17]

There is simply no basis for the assertion in the opinion below that Congress assumed that the limitation set out in Section 4B would be subject to tolling for "fraudulent concealment". Quite the contrary, Congress could only have acted under the assumption that, in adding an internal limitation covering causes of action created by the Clayton Act, no tolling situations would be recognized except the one which it chose to express.[18] There are also serious difficulties in applying a tolling doctrine of equitable origin to an

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[17] See also S. Rep. No. 619, 84th Cong., 1st Sess. (1955) at 6.

[18] See the unanimous opinion in *Midstate Horticultural Co.* v. *Pennsylvania R. Co.*, 320 U.S. 346 (1943), involving a federal statute of limitations added by amendment to replace state statutes of limitation which had previously been borrowed. A like rule has also been applied by Courts of Appeals. See, for example, *United States ex rel. Nitken* v. *Dawes*, 151 F. 2d 639 (7th Cir. 1945), *cert. denied*, 327 U.S. 788 (1946), holding that the statute of limitations under the False Claims Act could not be extended by a claim of fraud; *United States* v. *Berin*, 209 F. 2d 145 (5th Cir. 1954), holding that *Holmberg* v. *Armbrecht*, *supra*, did not support the tolling of the statute of limitations under the False Claims Act.

action for treble damages.[19] The legislators must necessarily have assumed that the statute would be tolled only where the statutory language says it can be and not otherwise.

It is manifest that Congress gave full consideration to the question whether there should be tolling under the circumstances alleged to exist in the present complaints and concluded that there should not be. The Court below erred in adding something to the statute which is not there and was not intended to be there.

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[19] Tolling doctrines of equitable origin are extremely inappropriate in treble damage actions such as these. In *Marshall* v. *Vicksburg*, 82 U.S. 146 (1873), this Court said at page 149:

> ". . . Equity never, under any circumstances, lends its aid to enforce a forfeiture or penalty, *or anything in the nature of either* . . ."

See also, *Stevens* v. *Gladding*, 58 U.S. (17 How.) 447 (1855); *Fleitmann* v. *Welsbach Street Lighting Co.*, 240 U.S. 27 (1916) (holding that treble damages under the antitrust laws cannot be recovered in an equitable action). The Court below obviously ignored these holdings in its conclusion that Section 4B is subject to tolling by reason of an equitable doctrine.

Conclusion

For the foregoing reasons, a writ of certiorari to the United States Court of Appeals for the Eighth Circuit should be granted.

Dated: February 28, 1963.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

GENERAL ELECTRIC COMPANY, *et al.*,
Petitioners,

v.

ATLANTIC CITY ELECTRIC COMPANY, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners* pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in these actions on December 31, 1962.

*The petitioners are the following 29 manufacturers of electrical and industrial equipment: A. B. Chance Company, Allen-Bradley Company, Allis-Chalmers Manufacturing Company, Carrier Corporation, C. H. Wheeler Manufacturing Company, The Clark Controller Company, Cornell-Dubilier Electronics, Inc., Cutler-Hammer, Inc., Federal Pacific Electric Company, Lester Wheeler Corporation, General Electric Company, H. K. Porter Company, Inc., Hubbard and Company, Ingersoll-Rand Company, I-T-E Circuit Breaker Company, Joslyn Mfg. & Supply Co., Kollman Electric Company, Lapp Insulator Company, Inc., Master Electric Company, Mooney Electric Company, Ohio Brass Company, The Porcelain Insulator Corporation, Sargano Electric Company, Schlanger Wood Corporation, Southern States, Inc., Square D Company, Wagner Electric Corporation, Westinghouse Electric Corporation and Worthington Corporation.

Opinions Below

The opinion of the District Court for the Southern District of New York is reported at 207 F. Supp. 613 and is annexed hereto as Appendix A. The opinion of the court of appeals affirming, with one dissent, the decision of the district court is reported at CCH TRADE REG. REP. (1963 Trade Cas.) ¶ 70,604, and is annexed hereto as Appendix B.

Jurisdiction

The judgment of the court of appeals was entered on December 31, 1962. R. III, 165.* The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

Question Presented

Whether the running of the statute of limitations provided by Congress in Section 4B of the Clayton Act with respect to an action for damages brought under Section 4 of the Clayton Act may be tolled by fraudulent concealment of the cause of action.

Statutes Involved

Clayton Act of 1914, Section 4, 15 U. S. C. § 15, 38 Stat. 731. Suits by persons injured; amount of recovery.

> "That any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent,

*"R." references are to the record and proceedings in the United States Court of Appeals for the Second Circuit.

without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

Clayton Act, Section 4B, 15 U. S. C. § 15b; 69 Stat. 283 (1955). Limitation of actions.

"Any action to enforce any cause of action under sections 4 or 4A shall be forever barred unless commenced within four years after the cause of action accrued. No cause of action barred under existing law on the effective date of this Act shall be revived by this Act."

Clayton Act, Section 5(b), 15 U. S. C. § 16(b), 69 Stat. 283 (1955). Suspension of limitations.

"Whenever any civil or criminal proceeding is instituted by the United States to prevent, restrain, or punish violations of any of the antitrust laws, but not including an action under section 4A, the running of the statute of limitations in respect of every private right of action arising under said laws and based in whole or in part on any matter complained of in said proceeding shall be suspended during the pendency thereof and for one year thereafter: *Provided, however*, That whenever the running of the statute of limitations in respect of a cause of action arising under section 4 is suspended hereunder, any action to enforce such cause of action shall be forever barred unless commenced either within the period of suspension or within four years after the cause of action accrued."

Statement

This petition seeks review of a judgment of the court of appeals (annexed hereto as Appendix C) affirming an order of the district court entered on August 1, 1962, (annexed

hereto as Appendix D) with respect to the applicable period of limitation in 427 treble damage actions pending in the United States District Court for the Southern District of New York.* The complaints in all of those actions claim treble damages under Section 4 of the Clayton Act, 15 U. S. C. § 15, resulting from alleged conspiracies in violation of Section 1 of the Sherman Act, 15 U. S. C. § 1, 26 Stat. 209 (1890). Each complaint alleges one or more causes of action for damages based on purchases of various kinds of electrical equipment during a period beginning, in some cases, at least as early as 1945. In order to support plaintiffs' claims in respect of periods of time outside the statutory period of limitation provided in Sections 4B and 5(b) of the Clayton Act, most of the 427 complaints further allege that the defendants named therein fraudulently concealed from plaintiffs the existence of the alleged conspiracies.

Sections 4B and 5(b) of the Clayton Act were enacted in 1955 and became effective on January 7, 1956. They provide that any cause of action under Section 4 of the Clayton Act shall be forever barred unless commenced within four years after the cause of action accrued or, if related criminal or injunction proceedings are commenced by the United States within the four-year period, during the pendency of such enforcement proceedings and one year thereafter. The complaints herein were filed at various times between November 1961 and August 1962. Government criminal and injunction proceedings, on which it is alleged the complaints herein are based in whole or in part,

*District Judge Bonsal's order of August 1, 1962, was entered on that date in Civil Action 83. By pre-trial order entered on September 14, 1962, Judge Bonsal's order was entered in nine additional actions which had been commenced after August 1, 1962. Record on Appeal, p. 100. By stipulation entered on November 7, 1962, the 427 actions were consolidated for purposes of appeal. R. III, 145.

were instituted in the United States District Court for the Eastern District of Pennsylvania at various times after February 1, 1960, and such criminal or injunction proceedings were either pending at the time the complaints herein were filed, or had been terminated not more than one year prior thereto.* The period of time beginning four years prior to the commencement of the relevant government proceedings, if any, is, therefore, herein referred to as the statutory period of limitation.

The order affirmed by the court of appeals denied the motion of defendants (the petitioners here) to strike under Rule 12(f) of the Federal Rules of Civil Procedure (1) all allegations relating to damages claimed for any period prior to the statutory period of limitation and (2) all allegations of fraudulent concealment of the alleged conspiracies. That motion to strike was made in accordance with a comprehensive plan of pre-trial procedure developed under the supervision of District Court Chief Judge Sylvester J. Ryan in conformity with a program approved by a subcommittee of the Judicial Conference Committee on Pre-Trial Procedure. That subcommittee had been directed by Mr. Chief Justice Warren to consider the handling of the more than 1,800 treble damage actions which have been commenced against manufacturers of electrical equipment in 33 federal judicial districts.** The motion was designed to permit a determination as to the applicable period of limitation at the outset of protracted litigation of unprecedented volume, scope and complexity in an effort to minimize the likelihood that existing judicial machinery would be overwhelmed by discovery proceedings and trials with respect to claims that would ultimately be held to be barred by the statute of limitations. Similar motions have been made in many of the other dic-

*Not all the defendants named herein were named as defendants in the relevant government enforcement proceedings.

**See N. Y. Times, February 7, 1962, p. 1, col. 7.

trict courts in which electrical equipment treble damage actions are pending and the decisions on those motions are now in various stages of appellate review.*

Petitioners contended in the district court and the court of appeals that the limitation provisions of Sections 4B and 5(b) bar all claims herein which did not accrue within the statutory period of limitation and that the allegations of fraudulent concealment are immaterial.

The Decision Below

The motion in the district court raised a question of law and no issue of fact. The district judge found that the prior opinion of the Second Circuit Court of Appeals in *Moviecolor Ltd.* v. *Eastman Kodak Co.* 288 F.2d 80 (2d Cir.), *cert. denied*, 368 U. S. 821 (1961), obliged him to hold that fraudulent concealment tolls the running of the 4-year period of limitations specified in Section 4B of the Clayton Act. App. 5a. The district court found further that its decision involved "a controlling question of law as to which

*A petition for certiorari (No. 881) was filed in this Court on February 28, 1963, seeking review of the decision of the Court of Appeals for the Eighth Circuit in *Kansas City* v. *Federal Pac. Elec. Co.*, 310 F. 2d 271 (8th Cir. 1962). Argument was heard in the Tenth Circuit on January 11, 1963, *Public Serv. Co.* v. *General Elec. Co.*, No. 7140, and in the Seventh Circuit on February 11, 1963, *Allis-Chalmers Mfg. Co.* v. *Commonwealth Edison Co.*, No. 13903. The Court of Appeals for the Ninth Circuit has granted an application for leave to appeal under 28 U. S. C. § 1292(b) from a decision of the District Court for the Southern District of California in *Department of Water & Power* v. *Allis-Chalmers Mfg. Co.*, CCH TRADE REG. REP. (1963 Trade Cas.) ¶ 70651 (S. D. Cal. 1963). Likewise, the Court of Appeals for the Fifth Circuit has granted an interlocutory appeal from an order of the District Court for the Western District of Texas in *City of San Antonio* v. *General Elec. Co.*, Civ. No. 3063, entered on December 7, 1962. A motion raising the statute of limitations question was decided and certified for interlocutory appeal by the District Court for the District of Columbia on March 5, 1963. *City of Burlington* v. *Westinghouse Elec. Corp.*, Civ. No. 348-62. A similar motion was filed on January 14, 1963, in *City of Lubbock* v. *Westinghouse Elec. Corp.*, No. 2777, in the District Court for the Northern District of Texas.

there is a substantial ground for difference of opinion, and that immediate appeal from the order may materially advance the ultimate termination of the litigation." App. 12a. Pursuant to that determination, the Court of Appeals for the Second Circuit granted petitioners' application for leave to appeal under 28 U. S. C. § 1292(b). R. 141. On its own motion the court of appeals ordered argument before the court sitting en banc "because of the importance of the question." App. 7b.

The court of appeals stated that its prior decision in *Moviecolor Ltd.* v. *Eastman Kodak Co.*, *supra*, was "not dispositive of the question now before us." App. 6b. It nevertheless affirmed the decision of the district court, relying upon the statement by this Court in *Holmberg* v. *Armbrecht*, 327 U. S. 392, 397 (1946), to the effect that the tolling doctrine of *Bailey* v. *Glover*, 21 Wall. 342 (1874), "is read into every Federal statute of limitation." The court below held:

> "As we read the Supreme Court's opinion in *Holmberg* v. *Armbrecht*, *supra*, that policy is so strong that it is applicable unless Congress expressly provides to the contrary in clear and unambiguous language." App. 10b.

Accordingly, the court concluded that congressional rejection of a number of bills, preceding the enactment of Section 4B of the Clayton Act in 1955,* which expressly provided that in conspiracy cases the statute of limitations would not begin to run until the claimant discovered or had reason to discover the facts on which his claim was based, did not constitute "the kind of express negative which we think would be necessary to reverse so well established a policy of the law." App. 10b. From that decision Circuit Judge Leonard

*A synopsis of the legislative history of Sections 4B and 5(b) is annexed hereto as Appendix E.

P. Moore dissented, observing that by reading the tolling provision into Section 4B the majority "enact, in effect, a statute deliberately rejected by Senate and House." App. 18b.

Reasons for Granting the Writ

The decision below involves an important question of federal law which has not been, but should be, settled by this Court because of its widely recognized impact on the administration of the federal courts and on the more than 1,800 electric equipment damage actions now pending in those courts and because it is predicated on a serious misinterpretation of *Holmberg* v. *Armbrecht*, 327 U. S. 392 (1946).

I.

The decision below involves the interpretation of a recent legislative addition to the federal antitrust laws not heretofore examined by this Court. After four decades of reliance on multifarious state statutes of limitation, Section 4B was adopted by Congress in 1955 in response to the demonstrated need for establishing a definitive and uniform federal period of limitation for the ever increasing volume of complex litigation for damages under the antitrust laws. See H. R. Rep. No. 422, 84th Cong., 1st Sess. (1955); S. Rep. No. 619, 84th Cong., 1st Sess. (1955); Att'y Gen. Nat'l. Comm. Antitrust Rep. 380-83 (1955).

The importance of the decision below is apparent from the novel view it takes of the relationship of the judiciary to the legislature and from its practical impact on the administration of justice. Since, as this Court observed in *Grunewald* v. *United States*, 353 U. S. 391, 402 (1957), "every conspiracy is by its very nature secret", the opportunity exists in every such case to allege fraudulent concealment

and, therefore, the effect of the decision below is to emasculate the statute of limitations provided by Congress with respect to a federally created cause of action. Where Congress wrote in 1955 that "*any cause of action* under sections 4 or 4A shall be forever barred unless commenced within four years after the cause of action accrued" subject only to the limited extension provided where a government criminal or injunction proceeding has been commenced, the decision below has held that causes of action alleging conspiracy shall in effect be exempted. And this anomalous result was reached in spite of the fact that Congress repeatedly rejected bills providing for tolling until discovery in conspiracy cases, witnesses having testified that such a tolling effectively removed the limitation and was administratively undesirable. *Hearings on S. 1910 before a Subcommittee of the Senate Committee on the Judiciary*, 81st Cong., 1st Sess. (1949); *Hearings before the Subcommittee on the Study of Monopoly Power of the House Committee on the Judiciary*, 81st Cong., 2d Sess., ser. 14, pt. 5 (1950).

The effect of the decision below is to impose on courts and litigants burdens which Congress sought to avoid. When it is noted that considerably more than 200 private antitrust actions are commenced in the federal courts each year,* many of which are difficult and protracted cases, the importance of the decision for the administration of the federal judicial system is manifest. The effect of the decision below on the 427 electrical equipment cases pending in the Southern District of New York is to bring within the ambit of litigation tens of thousands of additional transactions and sales aggregating hundreds of millions of dollars. When the more than 1,800 electrical equipment treble damage actions

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* Annual figures for the years 1957-1961 are given in ANN. REP. DIR. ADMIN. OFFICE OF THE U.S. COURTS 165 (1961). The number of actions commenced in 1961 was 378.

pending throughout the country are taken into account the administrative impact of the decision is staggering. Each additional year as to which claims may be asserted brings into question sales of electrical equipment averaging more than one billion dollars and involving hundreds of thousands of separate transactions. Some few of the complaints make claims with respect to transactions over a period of 30 years; many, if not most, of the complaints assert claims antedating the statutory period of limitation by as much as a decade. Even if confined to the statutory period of limitation these actions are of monumental proportions. If the statutory barrier to stale claims is removed, we submit that the capacity of the judiciary, of counsel and of the parties to litigate those claims in any rational and fair way will be exceeded. The need for adequate pre-trial discovery alone will swallow the energies and resources of all concerned. A decision which imposes burdens of these dimensions on the federal judiciary and on vital national industries calls for review by this Court at this time.

The fundamental importance of the decision of which review is here sought has been widely recognized. Evidence of that recognition may be seen in the determination of the district court below that it involves "a controlling question of law as to which there is a substantial ground for difference of opinion, and that immediate appeal from the order may materially advance the ultimate termination of the litigation." App. 12a. Eight other district courts before which electrical equipment treble damage actions are pending have made a similar determination.* Likewise the court of appeals

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City of San Antonio v. *General Elec. Co.*, Civ. No. 3063, W. D. Tex., December 7, 1962; *Department of Water & Power* v. *Allis-Chalmers Mfg. Co.*, CCH TRADE REG. REP., (1963 Trade Cas.) ¶ 70651 (S. D. Cal. 1963); *Brigham City Corp.* v. *General Elec. Co.*, 210 F. Supp. 574 (D. Utah 1962); *Public Serv. Co.* v. *Allen-Bradley Co.*, CCH TRADE REG. REP. (1962 Trade Cas.) ¶ 70549 (D. Colo.

below was led by its recognition of "the importance of the question" to order argument before the Court sitting en banc. App. 7b. It has been stated that it is the view of the Co-ordinating Committee for Multiple Litigation of the United States Courts, which has been charged with the responsibility of co-ordinating the electrical equipment cases, that the statute of limitations question is "probably the most important question we now have before us" and that the prevailing parties in the Second Circuit, respondents here, should join with the petitioners in seeking speedy review in this Court.*

A definitive determination of the applicable period of limitation is of vital importance to the functioning of the electrical equipment National Discovery Program itself, designed by the judges' Co-ordinating Committee to ease the burden imposed by this mass of litigation. Under that program documents are produced for inspection at a central national depository available to litigants in all of the 33 districts in which electrical equipment cases are pending; and depositions are held with the participation of all interested parties and are deemed to have been taken in each of the more than 1,800 actions. Plainly such a program cannot function effectively without a uniform ruling on the applicable period of limitation. Yet two of the district courts which have ruled on the question have held that the statutory period announced by Congress is not to be qualified by any

1962); *Commonwealth Edison Co.* v. *Allis-Chalmers Mfg. Co.*, 210 F. Supp. 557 (N.D. Ill. 1962); *United States* v. *General Elec. Co.*, 209 F. Supp. 197 (E.D. Pa. 1962); *Public Serv. Co.* v. *A. B. Chance Co.*, CCH TRADE REG. REPS. (1962 Trade Cas.) ¶ 70551 (D. N.M. 1962); *City of Burlington* v. *Westinghouse Elec. Corp.*, Civ. No. 348-62, D. D. C., March 5, 1963. In only one of those cases has leave to appeal under § 1292(b) been denied by a court of appeals. *United States* v. *General Elec. Co.*, Order of September 21, 1962 (3d Cir.).

*Statement of District Judge Edwin A. Robson at a meeting in San Antonio on February 7, 1963, attended by 23 judges and some 70 lawyers concerned with the electrical equipment cases. Transcript, pp. 5-8.

supposed judicial doctrine of fraudulent concealment and those decisions have not been reversed by courts of appeals.* Moreover, the decision of the Second Circuit is inconsistent with the decision of the Fifth Circuit in *United States* v. *Borin*, 209 F. 2d 145 (5th Cir.), *cert. denied*, 348 U. S. 821 (1954), where the court of appeals found the doctrine of *Holmberg* v. *Armbrecht*, 327 U. S. 392 (1946), inapplicable to the False Claims Act, 31 U. S. C. §§ 231-233, Rev. Stat. 3490-92 (1875). The court there wrote:

> ". . . The section is explicit in commanding that every such suit be commenced within six years from the commission of the act, *and not afterward*. This emphatic language must have been employed with full recognition of the fact that in most cases the falsity of the claim would remain concealed for a long time. The intention seems clear that the time would not be extended on account of any fraud or concealment." 209 F. 2d at 147-148.**

II.

The decision below is grounded on a serious misinterpretation of the decision of this Court in *Holmberg* v. *Armbrecht*, 327 U. S. 392 (1946).

The court below, first, was under the misapprehension that, after *Holmberg* v. *Armbrecht* and its predecessors, *Bailey* v. *Glover*, 21 Wall. 342 (1874); *Exploration Co.* v. *United States*, 247 U. S. 435 (1918), it was well known and should have been clear to Congress that a statute of limita-

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Public Serv. Co. v. *A. B. Chance Co.*, CCH TRADE REG. REP. (1962 Trade Cas.) ¶ 70551 (D. N. M. 1962); *Brigham City Corp.* v. *General Elec. Corp.*, 210 F. Supp. 574 (D. Utah 1962). See also *Rinzler* v. *Westinghouse Elec. Corp.*, C. A. No. 7427, N. D. Ga., October 30, 1962. (Not reported; reprinted at R. II. 131a.)

**In *Rinzler* v. *Westinghouse Elec. Corp.*, Civil Action No. 7427, N. D. Ga., October 30, 1962, *Borin* was held to control the application of Section 4B of the Clayton Act in a treble damage action and to preclude tolling for concealment. R. II. 131a. But see *City of San Antonio* v. *General Elec. Co.*, Civ. No. 3063, W. D. Tex., December 7, 1962 (no opinion).

tion applicable to a non-fraud cause of action at law would be tolled by reason of fraudulent concealment. That proposition was so far from being well known to Congress that from 1949 to 1955 a voluminous legislative history was generated on the very question of whether to provide for tolling until discovery in conspiracy cases. Never in the course of that history was *Holmberg* mentioned nor was it suggested that any tolling would be supplied in the absence of legislative provision. The failure of the numerous attorneys who variously urged or opposed the legislative adoption of a tolling provision to note that tolling would be read in by the courts in any event is explainable only by the fact that the proposition assumed by the court below is erroneous.

Holmberg was an action in equity and the doctrine there applied was traditionally limited to equity. It was only in 1961 that it was held for the first time that "the principle of Holmberg v. Armbrecht applies also in an action 'at law' to enforce a federal right." *Moviecolor Ltd. v. Eastman Kodak Co.*, 288 F. 2d 80, 84 (2d Cir.), *cert. denied*, 368 U. S. 821 (1961). Circuit Judge Friendly writing for the court in *Moviecolor* observed that "neither the parties' research, nor our own, has disclosed any decision truly determinative of that issue either by the Supreme Court or by a Court of Appeals . . ." *Id.* Furthermore, the equitable tolling doctrine has traditionally been applied only in suits the gravamen of which was fraud; indeed, it was a doctrine of concealed fraud rather than of fraudulent concealment. The opinion of this Court in *Holmberg*, written by Mr. Justice Frankfurter, referred precisely to "the settled federal equitable doctrine as to fraud", 327 U. S. at 397. A claim for treble damages under Section 4 of the Clayton Act is clearly not an action the gravamen of which is fraud and was, therefore, outside the ambit of the *Holmberg* case at the time when congressional committees were debating the desirability of a tolling provision.

Accordingly, the court below was in error in finding that *Holmberg* was applicable, and was known by Congress to be applicable, to such a claim prior to the enactment of Sections 4B and 5(b) in 1955. That error is underscored by the fact that congressional committees considered at length precisely the question of whether the judicial rule in fraud cases should be legislatively extended to causes of action under Section 4 of the Clayton Act alleging conspiracy. See, *e.g., Hearings on S. 1910 before a Subcommittee of the Senate Committee on the Judiciary*, 81st Cong., 1st Sess., pt. 2 at 56, 66 (1949). Professor Milton Handler, among others, in opposing such extension of the judicial fraud rule, advised Congress that:

> ". . . In the fraud field experience has indicated that the discovery provision does not operate very smoothly or happily. It injects this element of uncertainty, when the fraud has been discovered." *Hearings before the Subcommittee on the Study of Monopoly Power of the House Committee on the Judiciary*, 81st Cong., 2d Sess., ser. 14, pt. 5, at 21 (1950).

Conversely, Mr. Thurman Arnold urged that such extension was necessary for the protection of treble damage plaintiffs. *Hearings on S. 1910 before a Subcommittee of the Senate Committee on the Judiciary*, 81st Cong., 1st Sess. at 4, 5 (1949). It is thus perfectly clear that Congress could not have known and did not assume that *Holmberg* would be applicable to the statute of limitations it was drafting.

Still more important, the decision below construes Justice Frankfurter's statement in *Holmberg* that "this equitable doctrine is read into every federal statute of limitation," 327 U. S. at 397, to mean that Congress can reject such a doctrine only with "words which cannot be misunderstood" amounting to an "express negative" which can be operative

only by expressly providing "to the contrary in clear and unambiguous language." App. 10b. This remarkable test, the court below found, was not met by the clear language of Section 4B providing that "any action to enforce any cause of action under sections 4 or 4A shall be forever barred unless commenced within four years after the cause of action accrued." Nor was that test met by the lengthy legislative history of Section 4B though it reflected prolonged consideration of the problem of the potential treble damage plaintiff from whom a cause of action has been concealed and the repeated rejection of bills providing for the tolling of the period of limitation until the cause of action was discovered.* See Appendix E.

In erecting this obstacle to effective legislation the court below has distorted the meaning of a phrase from *Holmberg* into something which this Court could not possibly have contemplated. Unless the doctrine of *Holmberg* is one of

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*The court below indicated (at note 9), and the Eighth Circuit expressly held, that the legislative history is not convincing because the rejection was of a concept entirely different from fraudulent concealment. This notion is plainly wrong; its only support is drawn from the contracted label "discovery", inartfully adopted by the proponents of the tolling provisions. It is clear that Congress was *not* dealing with simple discovery, *i.e.*, with cases in which non-discovery is not the result of conspiracy or other concealment on the part of the defendants but nevertheless the injured party is unaware of the violation. Had Congress directed its attention to such simple discovery, the limitation of the proposed tolling provisions to conspiracy cases, the requirement of due diligence, and all the discussions during the hearings regarding causes of action concealed are meaningless and irrational.

It is also arguable that the court below, in its treatment of the congressional rejection of discovery provisions, regarded the rejected provisions as provisions for tolling only in inherently self-concealing violations and therefore as not involving any congressional consideration of tolling in the case of violations as to which defendants have engaged in further, affirmative acts of concealment. But this analysis is equally fallacious. Congress considered the problem of concealment in conspiracy cases as a whole—without any attempt to distinguish between the self-concealing and the actively concealed—and rejected tolling as a method of dealing with that problem.

constitutional dimension—which plainly it is not—there is no conceivable ground for reading it into any federal statute in contravention of manifest congressional intent. The federal courts are without constitutional power to override the intent of Congress in enacting legislation, either upon the basis of a supposed principle of equity jurisprudence or on any other ground except that of unconstitutionality. Mr. Justice Frankfurter was, of course, not unaware of this limitation of judicial authority. He clearly pointed out that:

> "If Congress explicitly puts a limit upon the time for enforcing a right which it created, there is an end of the matter. The Congressional statute of limitation is definitive . . . The rub comes when Congress is silent." 327 U. S. at 395.

Holmberg was a case where Congress was silent. The Court was at pains to point out that:

> ". . . The implied absorption of State statutes of limitation within the interstices of the federal enactments is a phase of fashioning remedial details where Congress has not spoken but left matters for judicial determination within the general framework of familiar legal principles." *Ibid.*

It was only "when Congress leaves to the federal courts the formulation of remedial details", that Justice Frankfurter concluded "it can hardly expect them to break with historic principles of equity in the enforcement of federally-created equitable rights." *Ibid.*

Quite apart from the fact that *Holmberg* involved equitable rights and the implied absorption of state statutes of limitation whereas the present cases involve legal rights and a definitive congressional statute of limitation, *Holmberg* involved a legislative situation altogether different from that presented here. Section 4B does not present a case in

which Congress left to the federal courts the formulation of remedial details. Section 4B is not a case where Congress has not spoken but left matters for judicial determination within the general framework of familiar legal principles. Nor is the situation one in which congressional familiarity with a federal equitable remedial concept can suggest that Congress assumed that the statute it passed would be read against such a decisional background. Indeed, as has been pointed out above, throughout the hearings and debates which led up to the passage of Section 4B neither *Holmberg* nor its predecessors were ever referred to. The uniform assumption alike on the part of the proponents and the opponents of a tolling provision was that if Congress should enact none there would be none. It is thus apparent that in misplaced reliance on an ambiguous dictum of this Court the court below has adopted a position entailing serious implications for the relationship between the legislative and judicial branches of the federal government which makes review by this Court highly desirable.

The appropriateness of review is emphasized by the fact that the result reached below is contrary to the views expressed by this Court in *Soriano* v. *United States*, 352 U. S. 270 (1957). This Court there rejected the contention that the statute of limitations with respect to actions in the Court of Claims, 28 U. S. C. § 2501,* was tolled by the existence of hostilities. The Court there said:

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*The pertinent part of 28 U. S. C. § 2501 (1958) reads:

"Every claim of which the Court of Claims has jurisdiction shall be barred unless the petition thereon is filed, or the claim is referred by the Senate or House of Representatives, or by the head of an executive department within six years after such claim first accrues.

"

"A petition on the claim of a person under legal disability or beyond the seas at the time the claim accrues may be filed within three years after the disability ceases."

> "Strangely enough, Congress would be required to provide expressly in each statute that the period of limitation was not to be extended by war. But Congress was entitled to assume that the limitation period it prescribed meant just that period and no more." 352 U. S. at 275-76.

The Court thus made it clear that Congress cannot be expected or required to expressly negative every imaginable unintended exception to statutes of limitation but is, on the contrary, entitled to assume that its clear and unambiguous language will be enforced according to its terms. Yet it is precisely an "express negative" which the court below would require of Congress.

The Court in *Soriano* also pointed out that Congress had specifically provided for tolling by virtue of hostilities when it thought it appropriate to do so. Similarly, Congress has repeatedly demonstrated its ability to provide expressly for tolling in cases of a concealed cause of action.* Indeed, in 1949 and again in 1950, bills which were the predecessors of Section 4B were introduced which expressly provided that, in actions based upon alleged conspiracies, *i.e.*, those in which concealment might constitute a significant problem, the period of limitation would not begin to run until the plaintiff in the exercise of due diligence discovered the facts relied on for proof of the conspiracy. S. 1910, 81st Cong., 1st Sess. (1949); H. R. 7905, 81st Cong., 2d Sess. (1950).

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*Title 31 U. S. C. § 131, 60 Stat. 31 (1946), provides that the statute of limitation on actions by the United States to recover on account of forged endorsements does not begin to run against persons who "fraudulently concealed the cause of such action. . . ."

The Tariff Act of 1930, 19 U. S. C. § 1621, 46 Stat. 758 (1930), as amended, 49 Stat. 527 (1935), provides that actions to recover penalties or forfeitures may be instituted "within five years after the time when the alleged offense was discovered. . . ."

The Securities Act of 1933 provides specifically, for at least two of the actions created thereunder, a limitation period measured from the time of discovery of the cause of action. See 15 U. S. C. § 77(m), 48 Stat. 84 (1933). See also Securities Exchange Act, 15 U. S. C. §§ 78i(e), 78r(c), 48 Stat. 889, 897 (1934).

Both of those bills were, after thorough consideration, rejected.

Furthermore, Congress wrote into the statute of limitations which it adopted an express provision for tolling the period of limitation during the pendency of government enforcement proceedings and one year thereafter (Clayton Act, Section 5(b)), thus giving potential private plaintiffs the substantial advantage of being able to wait until the termination of government proceedings with the attendant exposure and marshalling of evidence (and, in some cases, the further benefit of judgments usable as prima facie evidence under Section 5(a) of the Clayton Act). That Congress intended the tolling provided by Section 5(b) to be the exclusive method of extending the four-year period provided by Section 4B is clear from the proviso to Section 5(b) which states:

> "... That whenever the running of the statute of limitations in respect of a cause of action arising under section 4 is suspended hereunder, any action to enforce such cause of action shall be forever barred unless commenced either within the period of suspension or within four years after the cause of action accrued."

It is apparent from the Report of the House Committee on the Judiciary which accompanied the bill finally enacted by Congress in 1955 that tolling of the statutory period of limitation for the pendency of government proceedings was an aspect of a compromise of the conflicting desires to safeguard the rights of plaintiffs and, at the same time, to prevent the undue impairment of business operations and the overburdening of court calendars with stale claims. H. R. REP. No. 422, 84th Cong., 1st Sess., (1955).* Simi-

*H. R. REP. 422 states, at page 8:

"III. TOLLING THE STATUTE OF LIMITATIONS

"This bill makes several important changes in the tolling provisions of existing law. As presently written, section 5 of

larly, the rejection of bills providing for tolling until discovery in conspiracy cases reflects that compromise. It was, of course, recognized by Congress that the resolution might in some cases curtail recovery by treble damage plaintiffs,* but some such curtailment is inherent in every statute

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the Clayton Act tolls the statute of limitations with respect to private treble damage suits during the pendency of a suit by the United States to punish or restrain violations of the antitrust laws. This period of tolling is continued by the present bill with several modifications.

"There are many instances where the statute of limitations as to a private cause of action may nearly have expired before suit is instituted by the Government under the antitrust laws. Although the statute is tolled during the pendency of the proceedings brought by the United States, the plaintiff in a treble damage action may find himself hard pressed to reap the benefits of the Government suit if, upon its conclusion, he has but a short time remaining to study the Government's case, estimate his own damages, assess the strength and validity of his suit, and prepare and file his complaint. To alleviate such difficulties, the present bill would extend the tolling period not only for the duration of the Government's antitrust suit, but for 1 year thereafter. This would guarantee all plaintiffs an adequate period in which to take advantage of Government antitrust proceedings.

"While the committee believes it important to safeguard the rights of plaintiffs by tolling the statute during the pendency of Government antitrust actions, it recognizes that in many instances the long duration of such proceedings taken in conjunction with a lengthy statute of limitations may tend to prolong stale claims, unduly impair efficient business operations, and overburden the calendars of courts. It believes the provisions of this bill will tend to shorten the period over which private triple damage cases will extend by requiring that the plaintiff bring his suit within 4 years after it accrued or within 1 year after the Government's case has been concluded."

* In testifying on H.R. 3408, 82nd Cong., 1st Sess. (1951), which omitted the discovery provision contained in earlier bills, Congressman Patman stated:

"MR. PATMAN. . . . And by reason of that concealment and conspiracy these people have been destroyed, and yet they have no cause of action. It just occurs to me that there should be some way in a case like that that the parties who have been

of limitations. Where Congress has enacted a statute of limitations it has, of necessity, proceeded on the assumption that the legitimate public policy favoring a statute of repose and limiting the litigability of stale claims outweighs countervailing interests.

The decision to upset judicially a constitutional plan which Congress labored to fashion is not consonant with a relationship between the judiciary and the legislature recognized as appropriate by this Court. This Court held only last term that when a legislative course of action has been considered and rejected by Congress "the normal expectation is that courts will be faithful to their trust and abide by that decision." *Sinclair Ref. Co.* v. *Atkinson*, 370 U. S. 195, 210 (1962). See also *Blau* v. *Lehman*, 368 U. S. 403 (1961); *ICC* v. *J-T Transp. Co.*, 368 U. S. 81, 88-89 (1961).

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so unmercifully treated should have some kind of cause of action against those who conspired against them.

"MR. WILSON. Of course, if we had an act which did not begin to run until discovery, we would have practically no statute of limitations at all. It would be just unlimited.

"MR. PATMAN. That's right.

* * * *

"MR. PATMAN. . . . I know you gentlemen have a difficult job, and I am for the bill. If you have got to have 6 years, I am for it. I would rather have the discovery provision; but, if we can't have it, then I am still for the bill." *Hearings before the Subcommittee on the Study of Monopoly Power of the House Committee on the Judiciary*, 82nd Cong., 1st Sess., ser. 1, pt. 3, at 100, 101 (1951).

Subsequent inconsistent statements by Congressman Patman in colloquy with Congressman Celler on the floor of the House, suggest a disingenuous effort to supply by gloss the tolling provision which had admittedly been rejected. 101 CONG. REC. 5132-33 (1955), and stand forth as the sort of isolated and incongruous statements against reliance on which this Court has repeatedly warned. *Richards* v. *United States*, 369 U. S. 1, 10 n. 12 (1962); *FTC* v. *Anheuser-Busch, Inc.*, 363 U. S. 536, 553 (1960); *Pennsylvania R. R.* v. *International Coal Mining Co.*, 230 U. S. 184 (1913).

In sum, through a misunderstanding of the opinion of this Court in *Holmberg*, the court below has been led to ignore the plain language and legislative history of Section 4B in order to achieve an onerous and unworkable result previously rejected by Congress.

Conclusion

For the foregoing reasons, this petition for certiorari should be granted.

Respectfully submitted,

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